91-1391 (2)

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

RAY PATTON Petitioner,

against

STATE OF OHIO Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE LUCAS COUNTY, OHIO COURT OF APPEALS

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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO	*	Case No. CR88-6776
-vs-	*	JUDGE DONEGHY
RAY PATTON	*	AMENDED NOTICE OF APPEAL
Defendant (Appellant)	*	

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Now comes the Defendant (Appellant) in the subject case and appeals (and otherwise gives notice of his appeal) to the Lucas County Court of Appeals from the Judgment and Decision of the Lucas County Common Pleas Court dated January 25, 1989 (and as docketed on February 3, 1989) whereby Defendant (Appellant) was found guilty of two counts of rape (ORC 2907.02), one count of attempted rape (ORC 2907.02) and one count of aggravated breaking and entering (ORC 2911.11) and sentenced accordingly on January 25, 1989 to the Ohio Department of Corrections.

George R. Royer
Attorney for Defendant
(Appellant)

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Court of Appeals No. L-89-041

Appellee — Trial Court No. CR 88-6776

v.

DECISION AND JOURNAL ENTRY

Ray Patton

Decided: July 27, 1990

Appellant

* * * * * *

Anthony J. Pizza, prosecuting attorney and Dean P. Mandross, for appellee.

George R. Royer, for appellant.

* * * * * *

This case is on appeal from a judgment of the Lucas County Court of Common Pleas. On January 25, 1989, appellant-defendant, Ray Patton, was sentenced for a period of ten to twenty-five years each on two counts of aggravated rape in violation of R.C. 2907.02, ten to twenty-five years on one count of attemped rape in violation of R.C. 2923.02, and eight to fifteen years on one count of aggravated burglary in violation of R.C. 2911.13. All sentences were ordered to be served consecutively.

The facts as established at trial are as follows:

On September 9, 1988, a man entered the bedroom

of Lori Ambramczyk, placed a pillow over her face and demanded money. As the assailant led the victim into her living room, the victim observed the assailant touch and flip over a free standing mirror that the victim had previously cleaned that evening. After the victim gave the assailant $50.00 and her bank card, he attempted to forcibly perform anal intercourse with her. The assailant then forcibly engaged in vaginal intercourse with the victim. There then followed a period of time during which the assailant drank whiskey and requested the victim perform fellatio. The victim, who still had the pillow against her face, told her assailant that if she complied she would be able to see his face. The assailant then forced a second act of vaginal intercourse.

The victim was prevented from seeing her assailant during the incident because of the pillow upon her face; however, she did manage to get a glimpse of the skin on her assailant's arm, which she testified was black. The victim further described her assailant as being 5'8" to 5'10" in height, and

not having a full beard but not clean shaven either. The only other feature the victim testifed to was that her assailant had a low pitched voice.

The victim further testified that after her assailant raped her, he left her home with cash, a bank card, a VCR, a television and a bottle of whiskey, all belonging to the victim.

Officers Edward Marok and Keith Snyder of the Toledo Police Department then testified the two latent fingerprints lifted from the victim's mirror matched known fingerprints of the defendant taken from a previous arrest.

The defendant testified that he was not the assailant and that he was never in the victim's house on or before the date the crimes took place. The defendant further produced an expert witness to disqualify the similarities between the fingerprints known to belong to the defendant and those fingerprints removed from the victim's mirror.

The victim's brother, Richard Baker, also

testified at the trial. He was called to and arrived at his sister's home shortly after the assailand fled. Baker testified that he remained with the victim's two children as she and her husband went to the h;ospital. He further testified that shortly before dawn he heard a car door slam and went to look from the window of his sister's home. He noticed the defendant in the street standing by a car acting in a nervous manner. Baker saw the defendant enter the house next door to his sister's which was later determine to be the house of defendant's mother.

It is from the January 25, 1989 sentencing that the defendant raises the following twenty-four assignments of error:

"1. IT WAS ERROR TO CONVICT DEFENDANT AS TO BOTH RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE ATTEMPTED RAPE (CHARGE) (OR THAT THE TRIAL COURT WAS REQUIRED TO HAVE THE PROSECUTION ELECT AS TO WHICH COUNTS SHOULD HAVBE [sic] BEEN SUMITTED [sic] TO THE JURY.

"2. THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE AND REWNEWED [sic] AT THE END OF THE DEFENSE CASE (AS TO ALL COUNTS OF THE INDICTMENT.

"3. THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE JURY ARRAY

ADVANCED AT THE COMMENCEMENT OF TRIAL AND BEFORE EMPANELING OF THE JURY. (ALTERNATELY, THE APPLICABLE JURY PANEL SELECTION PROCESS IS UNLAWFUL AND UNCONSTITUTIONAL.)

"4. THE COURT ERRED IN NOT GRANTING MORE TIME TO DEFENDANT TO PREPARE FOR SENTENCING AFTER COMPLETION OF THE TRIAL, AND NOT COMPLY WITH THE REQUIREMENT OF ORC SECTION 2947.05, ET AL.

"5. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COURT TO SUSTAIN THE CONVICTION OF THE APPELLANT AS TO THE CONVICTION FOR RAPE 2907.02 AND ATTMPTED RAPE. (UNDER OHIO REVISED CODE SECTION 2923.02).

"6. THE COURT ERRED IN REFUSING TO GRANT ACCESS TO THE COMPLAINANT'S STATEMENT MADE TO THE TOLEDO POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY DEFENDANT (APPELANT) AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B)(6). (IT CONSTITUTED FURTHER ERROR NOT TO ADMIT SUCH STATEMENT INTO EVIDENCE.)

"7. THE COURT ERRED IN PERMITTING TOLEDO POLICE OFFICER EDWARD MAROK, TO TESTIFY AS AN EXPERT WITNESS ON FINGERPRINTING AND TESTIFY HEREIN AS TO SUCH MATTERS IN THIS CASE AND THEREBY RENDER AN OPINION AS TO THE LATENT PRINTS BEING THOSE OF DEFENDANT.

"8. IT CONSTITUTED ERROR TO PERMIT WITNESS SNYDER TO TESTIFY TO OPINION MATTERS (AS SET FORTH AT TRANSCRIPT PP 627-635).

"9. THE COURT ERRED IN PERMITTING WITNESS BAKER (THE BROTHER OF THE ALLEGED VICTIM) TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT, AS BEING SUGGESTIVE.

"10. THE COURT ERRED IN OVERRULING DEFENDANT'S (APPELLANT'S) MOTION THAT THE VOIR DIRE OF DEFENDANT'S FINGERPRINT EXPERT (MR. SZGETI) TAKE PLACE OUTSIDE THE PRESENCE OF THE JURY.

"11. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A RIGHT TO INSPECT THE GRAND JURY MINUTES [sic] APPLICABLE TO DEFENDANT'S (APPLICANT'S CASE AND SUCH DENIAL CONSTITUTES AN INFRINGEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHT UNDER THE UNITED STATES CONSTITUTION.

"12. THE COURT ERRED IN REFUSING TO SEPARATE FOR TRIAL THE CHARGES OF BURGLARY (2911.12) FROM THE RAPE CHARGES (ORC SECTION 2907.02 AND ORC SECTION 2923.06).

"13. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE (AS TO THE FINDING BY THE JURY THAT DEFENDANT WAS GUILTY AS TO ALL COUNTS OF THE INDICTMENT).

"14. THE COURT ERRED IN ADMITTING INTO EVIDENCE PROSECUTION EXHIBIT NUMBER 1-4 (MEDICAL RECORD OF COMPLAINANT) (RAPE KIT).

"15. THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER STATEMENTS WERE MADE THAT THE PROSECUTION WAS TALKING TO JURORS.

"16. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT'S COUNSEL TO ASK THE FOLLOWING QUESTION OF DEFENDANT'S FINGERPRINT EXPERT (AT PAGE 543 OF THE TRANSCRIPT (VOL. 11).

"17. THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF DEFENDANT (APPELLANT) PURSUANT TO OHIO REVISED CODE SECTION 2911.11 (BREAKING AND ENTERING).

"18. THE COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AGAINST DEFENDANT (APPELLANT) ON THE BASIS THAT THE INDICTMENT FAILED TO SPECIFY A TIME OF THE ALLEGED INCIDENT WITH ANY PARTICULARITY.

"19. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE TO RESTRICT THE INTRODUCTION OF FINGERPRINT EVIDENCE OF THE DEFENDANT (APPELLANT)

AND THAT DEFENDANT'S MOTION TO SUPPRESS SUCH EVIDENCE SHOULD HAVE BEEN GRANTED.

"20. THE OHIO REVISED CODE PROVISIONS UNDER WHICH DEFENDANT WAS CHARGED ARE UNCONSTITUTIONAL AND THEREFORE UNENFORCEABLE (AS AGAINST DEFENDANT [sic].

"21. THE COURT ERRED (AT PP. 245-248 OF TRANSCRIPT) WHEN IT PERMITTED THE PROSECUTOR TO ASK THE FOLLOWING QUESTION OF COMPLAINANT.

"22. THE CONVICTION OF DEFENDANT AS TO ALL COUNTS IS NOT PROPER, AND DEFENDANT'S CONVICTION SHOULD BE FOR THE LESSER DEGREE OF EACH OFFENSE.

"23. THE COURT ERRED IN PERMITTING THE PROSECUTION TO ADMIT INTO EVIDENCE THE FINGERPRINT PHOTOGRAPHS OF BOTH AND LATENT AND KNOWN PRINTS (EXHIBITS A, B, C AND D OF THE STATE) AS WELL AS OTHER EVIDENCE OF THE MATCHING OF DEFENDANT'S PRINTS WITH THE KNOWN PRINTS.

"24. IT WAS ERROR TO CONVICT DEFENDANT AS TO THE RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE BURGLARY CHARGE."

The defendant argues in his first and twenty-fourth assignments of error that the four offenses the defendant is charged with (two counts of rape, one count of attempted rape, and one count of burglary) are offenses of similar import so that the defendant can only be convicted of one offense.

R. C. 2941.25 provides as follows:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> "(B) Where the defendant's conduct constitutes two or more offenses of similar import, or where his conduct results in two or more offenses of the same or similar kind committed separately, or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

In State v. Logan (1979), 60 Ohio St. 2d 126, 128, the court held "that in order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed."

In light of the dissimilarity between the elements of the crimes of burglary and rape, we hold that such crimes are not allied offenses of similar import. Therefore, we find the defendant was properly convicted of burglary as a separate offense from the charges of rape and attempted rape.

Even though a defendant is charged with two or more offenses of the same or similar import, R.C. 2941.25(B) provides that if such defendant possessed a separate animus as to each offense, he may be convicted of all of them. State v. Logan, supra, at 129. In reviewing a trial court's finding that there existed a separate animus for each offense charged,

this court must determine whether there is substantial evidence to support such a finding. Id. at the syllabus. In State v. Barnes (1981), 68 Ohio St. 2d 13, 14, the court held that a forcible act of fellatio followed by forcible vaginal intercourse constituted two separate rape offenses.

In the present case, the defendant attempted anal intercourse and stopped only after the victim told him it was hurting her. The defendant then proceeded to force vaginal intercourse on the victim. Afterwards, the defendant began drinking whiskey and asked the victim to perform oral sex upon him, which the victim talked the defendant out of. The defendant then forced vaginal intercourse with the victim a second time.

We find that there is substantial evidence to support a finding that each of the defendant's acts was a separate and individual offense and each was done with a different and distinct intention on the defendant's part. Therefore, the defendant's first and twenty-fourth assignments of error are found not well-taken.

The defendant in his second assignment of error argues that the trial court erred by refusing the defendant's motion for judgment of acquittal. Specifically, the defendant argues that the state failed to present sufficient evidence showing that he acted "purposely" in committing the offense of rape and attempted rape.

R.C. 2901.22(A) states that "a person acts purposely when it is his specific intention to cause a certain result." Further, in State v. Bridgeman (1978), 55 Ohio St. 2d 261, the syllabus, the court held as follows:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

In the present case, the victim testified that the defendant forced vaginal intercourse on her twice, attempted anal intercourse, and asked the victim to perform oral sex upon him. We find that reasonable minds could reach different conclusions as to whether the defendant acted with purpose. Therefore, the defendant's second assignment of

error is found not well-taken.

The defendant's fifth, thirteenth and seventeenth assignments of error each question the adequacy of the evidence as to his conviction. Specifically, the defendant argues his conviction was based solely on circumstantial evidence.

In State v. Barnes (1986), 25 Ohio St. 3d 203, 209, certiorari denied (1987), 480 U.S. 926, the court held that a verdict is not against the manifest weight or sufficiency of the evidence "where substantial evidence is offered by the state in support of all the elements of the offenses charged, and if such evidence was of sufficient probative value to sustain a conviction***." A reviewing court is limited to a determination of whether substantial evidence was adduced at trail "upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." State v. Eley (1978), 56 Ohio St. 2d 169, the syllabus. However, as the Supreme Court of Ohio stated in State v. Kulig (1974, 37 Ohio St. 2d 157, 160, "[I]t is settled that where circumstantial evidence alone is relied

upon to prove an element essential to a finding of guilt, it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence."

In State v. Brown (1988), 38 Ohio St. 3d 305, 313, certiorari denied (1989), ___U.S. ___, 57 U.S. L.W. 3552, the Supreme Court of Ohio considered both the direct and circumstantial evidence in upholding the defendant's conviction for aggravated murder. In Brown, the defendant's conviction was upheld because of the direct evidence of her fingerprints and circumstantial evidence placing her and her victim as last being seen together constituted "substantial evidence from which the jury could have determined beyond a reasonable doubt" the defendant's guilt. Id. at 313.

In the present case, the victim's uncontradicted testimony is direct evidence that she was raped and her home was burglarized. The only element of the offenses charged that was not established by the victim's testimony was the identity of her assailant. However, the victim further testified that she heard her assailant bump into

and turned over a free standing mirror in her living room prior to leaving her house. The victim further testified she had cleaned the mirror earlier in the evening. Toledo Police Officer Marok lifted and identified the fingerprints as having come from the defendant. The fingerprint testimony constitutes direct evidence linking the defendant to the scene of the crime and refutes the defendant's testimony that he was never inside the victim's house.

Accordingly, we find there was substantial evidence brought forth by the state upon which a jury could reasonably conclude that all elements of the offenses charged were proven beyond a reasonable doubt. Therefore, we find the defendant's fifth, thirteenth, and seventeenth assignments of error not well-taken.

The defendant's third assignment of error is that the trial court refused to grant the defendant's motion to set aside the jury array. The defendant contends that the selection of the jury array did not comport with the requirements of R.C. 2313.16 because potential jurors were improperly excluded from jury service.

R.C. 2313.16 provides, in pertinent part, as follows:

> "When a person liable to serve is excused, in a case specified in this section or when a person notified to attend a term as a jury is entitled to and claims an exemption, the juror can be excused only by the judge presiding at the term which the juror has been notified to attend. Such an excuse shall not extend beyond that term."

However, Crim. R. 24(E) provides, in pertinent part, as follows:

> "No array of petit jurors shall be set aside nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return."

In the present case, the acting jury commissioner clerk testified that approximately twenty potential jurors were excused over the phone by the jury commissioner. These potential jurors were excused for reasons such as being over seventy years of age, attending school or having young children to care for. The jury commissioner further testified that seventy-five jurors were available on the day trial commenced.

We find any alleged impropriety involving

the excuse of potential jurors was insignificant and an insufficient basis to set aside the jury verdict. Accordingly, we find the defendant's third assignment of error not well-taken.

The defendant's fourth assignment of error is that the trial court erred by refusing to grant the defendant's counsel more time to prepare for sentencing. The defendant's counsel contested the defendant's sentencing immediately following the verdict announcement because he was exhausted and unprepared. However, the defendant stated for the record that he wished that the sentencing be held immediately following the verdict.

R. C. 2947.05 states:

> "Before sentencing is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say to to why judgment should not be pronounced against him."

In the present case, the defendant was afforded the opportunity to speak before sentencing was pronounced and he elected to proceed. Therefore, we find the defendant's right to due process was not violated and his fourth assignment of

error is found not well-taken.

In defendant's sixth assignment of error, defendant argues that the trial court erred by refusing to grant access to victim's statements made to the Toledo Police Department about her attack. Specifically, the defendant questions apparent discrepancies between the victim's description to the police as to her assailant's height and what caused her to believe that the assailant thought she was living alone.

A review of the trial court record reveals that the defendant's counsel was given and reviewed the victim's statements and afforded the opportunity to question the victim about any discrepancies during cross-examinaiton. Accordingly, we find defendant's sixth assignment of error not well-taken.

The defendant in his seventh and eighth assignments of error contest the use of Toledo Police Officers Edward Marok and Keith Snyder by the state as qualified expert witnesses. The defendant argues that the trial court erred in permitting the two officers to testify on

fingerprinting as experts.

In Shackleford v. Cortec, Inc. (1982), 8 Ohio App. 3d 418, 419, the court held:

> "The determination of whether an individual is qualified to give an expert opinion is within the discretion of the trial court and will not be reviewed on appeal unless the trial court clearly abused its discretion."

In the present case, we find the trial court did not abuse its discretion in determining that Officers Marok and Snyder were qualified experts because of the adequate training and length of service spent working on identifying fingerprints by both officers. Officer Marok testified that he had been a Toledo police officer for twenty-two years and been with the Scientific Investigation Unit for fourteen years. He further testified that he presently spends three to five hours of every work day analyzing fingerprints. He received his first training in fingerprint comparison from the Federal Bureau of Investigation in 1975 and has attended additional seminars through the years at the Ohio Peace Officer's Training Academy in London, Ohio. Officer Marok testified that he

has given testimony regarding fingerprint identification in courts of law on over one hundred occasions and has compared and examined "thousands, literally thousands" of fingerprints. Additionally, Officer Marok is a past instructor at Owen Techincal College where he has taught courses in crime scene processing and fingerprint comparison.

Officer Snyder testified that he is a sergeant with the Toledo police department and in charge of the Scientific Investigation Unit. Additionally, he has been a police officer for fourteen years. He testified that his duties include the supervision of all the evidence technicians for the City of Toledo police department. Sergeant Snyder holds an associate's degree of law enforcement and has over one hundred fifty hours toward his bachelor's degree at Bowling Green State University. Additionally, he has had fingerprint training by the Phoenix Police Academy, the Michigan State Police Department, the Ohio Peace Officers' Training Academy, which included two forty-hour instructional courses conducted by the Federal Bureau of Investigation. Additionally, he spent from 1985 until 1988 with the Toledo Police

Scientific Investigation Unit where he conducted fingerprint comparisons which included the development, dusting and lifting of latent fingerprints. Moreover, he is an instructor at the police academy's investigator school, where he teaches courses on fingerprint collection and processing for new investigators.

Accordingly, defendant's seventh and eighth assignments of error are found not well-taken.

In defendant's ninth assignment of error, defendant argues that the in-court identification made by the state's witness, Richard Baker, constituted a violation of his right to due process because such identification was suggestive and not supported by an independent identification.

In State v. Brown, supra, at 310, the court, citing Manson v. Brathwaite (1977), 432 U.S. 98, held that where a witness identifies a suspect during a pretrial procedure, such identification must be suppressed "if the confrontation procedure was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under the totality of the circumstances." However, where there is no

pretrial confrontation procedure, a defendant "cannot claim there was a confrontation procedure that was unnecessarily suggestive." Brown, supra, at 310. Any alleged suggestiveness of such in-court identification "goes to weight and reliability of the testimony rather than admissibility." Id. at 311. Further, "any prejudicial effect of the testimony could have been cured by effective cross-examinaiton." Id.

In the present case, witness Baker was not involved in any pretrial confrontation procedure with the defendant. Therefore, we find the trial court properly admitted Baker's testimony. Accordingly, we find the defendant's ninth assignment of error not well taken.

The defendant in his tenth assignment of error argues that the trial court erred by permitting the state's voir dire examination of the qualification of defendant's expert witness in the presence of the jury prior to such expert's direct testimony. Specifically the defendant argues that the state was permitted to question the expert witness' credibility, rather than his qualifications as an expert witness.

Evid. R. 104(C) states as follows:

> "(C) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require."

We hold that a trial court's determination whether to hold a hearing outside the presence of a jury, other than a hearing on the admissibility of confessions, lies within such trial court's discretion. Further, pursuant to Ohio Evid. R. 611, the court has reasonable control over the mode and order used to interrogate witnesses. Such control lies within the discretion of the trial court. State v. Mahoney (1986), 34 Ohio App. 3d 114, 118.

In the case at hand, we do not find that the lower court abused its discretion in permitting the state to ask the defendant's expert witness questions concerning his qualifications, in the presence of the jury, prior to his direct testimony. Therefore, the defendant's tenth assignment of error is found not well-taken.

The defendant in his eleventh assignment of error contends that the trial court erred by overruling defendant's motion to inspect the grand jury minutes.

The Supreme Court of the United States in United States v. Proctor & Gamble Co. (1958), 356 U.S. 677, 683, held that the defendant must show a "particularized need" before the usual shroud of secrecy surrounding grand jury minutes can be lifted by the trial judge. IN State v. Cecos Internatl. Inc. (1988, 38 Ohio St. 3d 120, 124, the court set forth the following standard for determination of a "particularized need" when considering opening grand jury minutes to the defendant's counsel:

> "The standard for a particularized need is met where the defendant's need for the information outweighs the need to maintain the secrecy of the grand jury proceedings."

Further, before an appellate court can disturb a trial court's ruling denying access to the grand jury testimony, there must be a finding of an abuse of discretion. State v. Brown, supra, at 308. An "abuse of discretion" has been defined to mean an attitude by the trial court that is unreasonable, arbitrary or unconscionable. State v. Adams (1980), 62 Ohio St. 2d 151, 157.

In the present case, the alleged discrepancies between the victim's trial testimony and her

grand jury testimony are the same discrepancies between the victim's trial testimony and the victim's statement to police. As we found in the sixth assignment of error, the defendant cross-examined the victim as to these alleged discrepancies.

Therefore, we find, the trial court did not abuse its discretion in overruling the defendant's motion to inspect the grand jury minutes and the defendant's eleventh assignment of error is found not well-taken.

The defendant in his twelfth assignment of error argues that the trial court erred by not ordering separate trials for the burglary and rape charges.

Crim. R. 8(A) provides as follows:

> "Joinder of offenses. Two or more offenses may be changed in the same indictment, information or complaint in a separate court for each offense if the offenses charged, whether felonies or misdemeanor or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts of transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

However, Crim. R. 14 provides in pertinent part, as

follows:

> "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial."

Further, in State v. Torres (1981), 66 Ohio St. 2d 340, the syllabus, the court held as follows:

> "A defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he msut demonstrate that the court abused its discretion in refusing to separate the charges for trial."

Both in his motion to the trial court and in his argument on appeal, the defendant simply asserts that joinder of the burglary and rape

charges was prejudicial. He states no grounds to support this allegation of prejudice nor furnishes any information to demonstrate how his right to a fair trial was compromised.

Upon review of the offenses charged and the record below, we find that the lower court was within its discretion to join the charges in the interest of judicial economy and because no prejudice to the defendant is demonstrated. Therefore, we find the defendant's twelfth assignment of error not well-taken.

The defendant in his fourteenth assignment of error argues the trial court erred by admitting into evidence the victim's medical record and the rape kit. The defendant claims this evidence is hearsay and therefore inadmissible.

Evid. R. 801(C) defines "hearsay" as "a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Further, Evid. R. 801(A) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is

intended by him as an assertion."

In the present case, there is no indication that the victim's medical record was ever admitted into evidence in the proceedings below. Further, the rape kit, which consists of four envelopes containing materials, hairs and specimens obtained from the victim, constitutes physical evidence. Such physical evidence is not a statement and therefore not subject to the hearsay rule. Accordingly, defendant's fourteenth assignment of error is found not well-taken.

The defendant's fifteenth assignment of error concerns a voir dire examination of the female jurors after the trial had commenced. This voir dire was held to determine whether the assistant prosecutor had conversations with any of the female jurors during one of the trial's recesses. This claim was made by defendant's relatives and friends. It was determined that the assistant prosecutor did not speak with any of the jurors. However, the defendant argues that the entire process appeared to leave a "residual prejudice" to his case, and therefore, a mistrial should have

been granted.

We fail to see how this jury examination would cause any prejudice in the minds of jurors. We, therefore, find the defendant's fifteenth assignment of error not well-taken.

In his sixteenth assignment of error, the defendant argues the trial court erred in limiting the questioning of the defendant's expert witness on redirect examination during voir dire. Defendant's expert had testified that he had received formal training in Hungary approximately thirty-five years ago regarding fingerprint identification. Upon cross-examination, the expert witness admitted he had no certificate in his possession to coorborate his training. Upon redirect examination, the following exchange took place between defense counsel, Attorney George R. Royer, the court and expert witness:

> "Q. You want to explain to the Court and jury the circumstances under which you left Hungary and why you don't have your certificate here in this country?
>
> "A. As I stated up front, I came here under political asylum after the revolution. I was shot three times, and I was sentenced to die, and I didn't feel like dying, so lucki-

ly with other helps, I did escape to Austria.

"Q. How did you go to Austria from Hungary?

"MR. MANDROSS: Your Honor --

"MR. ROYER: Wait a minute. This is important about why he doesn't have his certificate.

"THE COURT: I will sustain the objection as to the circumstances. I think we can ge to the conclusions without going into all the particulars.

"MR. ROYER: Well, I think that --

"THE COURT: I have ruled. Let's go to the ultimate issue.

"MR. ROYER: I want to make a proffer for the record quickly.

"THE COURT: The Court will just rephrase the question itself. Mr. Szigetti, as a result of the manner of fashion of which you left for Austria, was it under such circumstances as you did not bring any personal belongings, including your certificate with you?

"THE WITNESS: That's correct. I couldn't even bring my birth certificate."

The defendant proffered that the expert witness would have testified that in escaping Hungary, he traversed the Danube by swimming alone just after the peak of the 1956 Hungarian Revolution and could not carry any documents with him.

In State v. Sage (1987), 31 Ohio St. 3d 173, paragraph two of the syllabus, the court held that

"[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." Further, such exercise of discretion will not be disturbed by a reviewing court "absent a showing that the accused has suffered material prejudice." Id. at 182.

We fail to see how the refusal to admit the proffered testimony could prejudice the defendant because his expert witness was allowed to justify why he did not have his documentation. Any further explanation of his escape has no legal bearing on the defendant's case. Therefore, we do not find the trial court abused its discretion. Accordingly, we find the defendant's sixteenth assignment of error not well-taken.

The defendant in his eighteenth assignment of error argues that the trial court erred by refusing to dismiss the indictment on the basis that it failed to specify time in which the offenses occurred.

In State v. Sellards (1985), 17 Ohio St. 3d 169, 171, the Supreme Court of Ohio held that the exact time of an offense is not essential to an indictment unless a necessary element of such

offense.

In the present case, the indictment itself set forth that the offenses occurred on September 9, 1988. Further, the state filed a bill of particulars on January 18, 1989, which further specified the time of the incident to be between 11:15 p.m. and 2:30 a.m. on September 9, 1988. We, therefore, find the defendant's eighteenth assignment of error not well-taken.

As his nineteenth assignment of error, the defendant argues that the trial court erred in refusing to suppress the known fingerprints of the defendant to which the unknown latent fingerprints were compared to at trial. The defendant argues that the known fingerprints were obtained as a result of defendant's allegedly illegal arrest on September 19, 1988.

We find this assignment of error not well-taken because the latent fingerprints were matched to known fingerprints of the defendant obtained from a prior, unrelated, January 7, 1983 arrest and not as a result of the defendant's September 19, 1988 arrest.

The defendant's twentieth assignment of error attacks the constitutionality of R.C. 2907.02 (the rape statute) and R.C. 2911.11 (the aggravated burglary statute). It is the contention of the defendant that the above mentioned sections are unconstitutional because of vagueness. The defendant first asserts that the meaning of "sexual conduct" in R.C. 2907.02 is not properly defined and is, therefore, vague.

The Fourteenth Amendment of the United States Constitution and Article I, Section 16 of the Ohio Constitution mandate that criminal statutes comport with certain basic due process considerations. One such requirement is that the legislation may not be unduly vague and specious. Hence, the United States Supreme Court had held "that [a statute] is void for vagueness where it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute *** and *** because it encourages arbitary and erratic convictions." Papachristou v. City of Jacksonville (1972), 405 U.S. 156.

The defendant first asserts that the meaning of

"sexual conduct" in R.C. 2907.02 is not properly defined and is, therefore, vague. "Sexual conduct" is defined by R.C. 2907.01(A) as "vaginal intercourse between a male and female, and anal intercourse *** between persons regardless of sex." We do not find such definition improper or vague.

The defendant also contends that R.C. 2911.11 is also improper and vague, yet he does not further support this argument. Upon review of the language in the statute, we do not find that R.C. 2911.11 is unconstitutionally vague. Therefore, the defendant's twentieth assignment of error is found not well-taken.

The defendant's twenty-first assignment of error contends that the trial court erred by permitting the prosecutor to ask the victim the following question:

> "Q. Now, did the detective ask you whether or not you felt [your assailant] was taller or shorter than you?"

The defendant argues that the question was leading, designed to elicit a hearsay response and that it had a prejudicial effect on his case.

Upon review of the record, we find that the victim did not answer the prosecutor's question.

Further, we fail to see how the prosecutor's question along had any prejudicial effect on the defendant. Therefore, we find the defendant's twenty-first assignment of error not well-taken.

The defendant in his twenty-second assignment of error, argues that the jury verdict did not properly delineate the degree of the offense charges.

Upon review of the jury verdict, we find such verdict clearly indicated the degree of each offense of which the defendant was charged. Accordingly, the defendant's twenty-second assignment of error is found not well-taken.

As his twenty-third assignment of error, the defendant argues that the trial court erred by admitting the state's exhibits. Apparently, the defendant is arguing that the state's exhibits were not properly authenticated or identified.

Evid. R. 901(A) provides as follows:

> "A requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc. (1982), 8 Ohio App. 3d 155, 158,

the court held that the evidentiary requirement of authentication or identification is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In the present case, the following exhibits were introduced by the state: (1) state Exhibit A, a rape kit identified at trial by Nurse Melodie Brooks who was present at the time of the victim's examination at the Toledo Hospital, (2) state Exhibit B, a latent fingerprint found at the crime scene which was recovered, and identified at trial, by Officer Edward Marok of the Toledo Police Department, (3) state Exhibit C, known fingerprints of the defendant which identity is not contested and (4) state Exhibit D, a photographic enlargement of the known and latent fingerprint identified by Officer Marok.

We find the evidence going to the identification and authentication of the states exhibits was sufficient to support a finding that each exhibit was what the state claimed. Therefore, we find the defendant's twenty-third assignment of error not well-taken.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that the appellant pay the court costs of ths appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

State v. Ray Patton
C.A. No. L-89-041

Peter M. Handwork, P.J. _____ PRESIDING JUDGE

George M. Glasser, J. _____ JUDGE

Melvin L. Resnick, J. _____ JUDGE

ASSIGNMENTS OF ERROR SET FORTH BY APPELLANT
IN LUCAS COUNTY COURT OF APPEALS

"1. IT WAS ERROR TO CONVICT DEFENDANT AS TO BOTH RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE ATTEMPTED RAPE(CHARGE)(OR THAT THE TRIAL COURT WAS REQUIRED TO HAVE THE PROSECUTION ELECT AS TO WHICH COUNTS SHOULD HAVEBE [sic] BEEN SUMITTED [sic] TO THE JURY.)

"2. THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE AND REWNEWED [sic] AT THE END OF THE DEFENSE CASE (AS TO ALL COUNTS OF THE INDICTMENT).

"3. THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE JURY ARRAY ADVANCED AT THE COMMENCEMENT OF TRIAL AND BEFORE EMPANELING OF THE JURY. (ALTERNATELY, THE APPLICABLE JURY PANEL SELECTION PROCESS IS UN LAWFUL AND UNCONSTITUTIONAL).

"4. THE COURT ERRED IN NOT GRANTING MORE TIME TO DEFENDANT TO PREPARE FOR SENTENCING AFTER COMPLETION OF THE TRIAL, AND NOT COMPLY WITH THE REQUIREMENT OF ORC SECTION 2947.05, ET AL.

"5. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COUPT TO SUSTAIN THE CONVICTION OF THE APPELLANT AS TO THE CONVICTION FOR RAPE 2907.02 AND ATTEMPTED RAPE. (UNDER OHIO REVISED CODE SECTION 2923.02).

"6. THE COURT ERRED IN REFUSING TO GRANT ACCESS TO THE COMPLAINANT'S STATEMENT MADE TO THE TOLEDO POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY DEFENDANT (APPELLANT)AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B0(6). (IT CONSTITUTED FURTHER ERROR NOT TO ADMIT SUCH STATEMENT INTO EVIDENCE.)

"7. THE COURT ERRED IN PERMITTING TOLEDO POLICE OFFICER EDWARD MAROK, TO TESTIFY AS AN EXPERT WITNESS ON FINGERPRINTING AND TESTIFY HEREIN AS TO

SUCH MATTERS IN THIS CASE AND THEREBY RENDER AN OPINION AS TO THE LATENT PRINTS BEING THOSE OF DEFENDNT.

"8. IT CONSTITUTED ERROR TO PERMIT WITNESS SNYDER TO TESTIFY TO OPINION MATTERS (AS SET FORTH AT TRANSCRIPT PP 627-635).

"9. THE COURT ERRED IN PERMITTING WITNESS BAKER (THE BROTHER OF THE ALLEGED VICTIM) TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT, AS BEING SUGGESTIVE.

"10. THE COURT ERRED IN OVERRULING DEFENDANT'S (APPELLANT'S) MOTION THAT THE VOIR DIRE OF DEFENDANT'S FINGERPRINT EXPERT (MR. SZGETI) TAKE PLACE OUTSIDE THE PRESENCE OF THE JURY.

"11. THE COURT ERRED IN OVERRULING DEFENDANTS MOTION FOR A RIGHT TO INSPECT THE GRANT JURY MINUES [sic] APPLICABLE TO DEFENDANT'S APPLICANT'S) CASE AND SUCH DENIAL CONSTITUTES AN INFRINGEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHT UNDER THE UNITED STATES CONSTITUTION.

"12. THE COURT ERRED IN REFUSING TO SEPARATE FOR TRIAL THE CHARGES OF BURGLARY (2911.12) FROM THE RAPE CHARGES (ORC SECTION 2907.02 AND ORC SECTION 2923.06).

"13. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE (AS TO THE FINDING BY THE JURY THAT DEFENDANT WAS GUILTY AS TO ALL COUNTS OF THE INDICTMENT.)

"14. THE COURT ERRED IN ADMITTING INTO EVIDENCE PROSECUTION EXHIBIT NUMBER 1-4 (MEDICAL RECORD OF COMPLAINANT) (RAPE KIT)

"15. THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER STATEMENTS WERE MADE THAT THE PROSECUTION WAS TALKING TO JURORS.

"16. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT'S COUNSEL TO ASK THE FOLLOWING QUESTION OF

DEFENDANT'S FINGERPRINT EXPERT (AT PAGE 543 OF THE TRANSCRIPT (VOL. 11).

"17. THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF DEFENDANT (APPELLANT) PURSUANT TO OHIO REVISED CODE SECTION 2911.11 (BREAKING AND ENTERING.)

"18. THE COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AGAINST DEFENDANT (APPELLANT) ON THE BASIS THAT THE INDICTMENT FAILED TO SPECIFY A TIME OF THE ALLEGED INCIDENT WITH ANY PARTICULARITY.

"19. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE TO RESTRICT THE INTRODUCTION OF FINGERPRINT EVIDENCE OF THE DEFENDANT (APPELLANT) AND THAT DEFENDANT'S MOTION TO SUPPRESS SUCH EVIDENCE SHOULD HAVE BEEN GRANTED.

"20. THE OHIO REVISED CODE PROVISIONS UNDER WHICH DEFENDANT WAS CHARGED ARE UNCONSTITUTIONAL AND THEREFORE UNENFORCEABLE (AS AGAINST DEFENDANT [sic].

"21. THE COURT ERRED (AT PP. 245-248 OF TRANSCRIPT) WHEN IT PERMITTED THE PROSECUTOR TO ASK THE FOLLOWING QUESTION OF COMPLAINANT.

"22. THE CONVICTION OF DEFENDANT AS TO ALL COUNTS IS NOT PROPER, AND DEFENDANT'S CONVICTION SHOULD BE FOR THE LESSER DEGREE OF EACH OFFENSE.

"23. THE COURT ERRED IN PERMITTING THE PROSECUTION TO ADMIT INTO EVIDENCE THE FINGERPRINT PHOTOGRAPHS OF BOTH AND LATENT AND KNOWN PRINTS (EXHIBITS A, B, C AND D OF THE STATE) AS WELL AS OTHER EVIDENCE OF THE MATCHING OF DEFENDANT'S PRINTS WITH THE KNOWN PRINTS.

"24. IT WAS ERROR TO CONVICT DEFENDANT AS TO THE RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE BURGLARY CHARGE."

§ 2941.25 Multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

§ 2313.16 Juror may be excused.

Except as provided by section 2313.13 of the Revised Code, the court of common pleas shall not excuse a person, liable to serve as a juror and drawn and notified, unless it is shown to the satisfaction of the judge by either the juror or another person acquainted with the facts, that:

(A) The juror is then necessarily absent from the county, and will not return in time to serve;

(B) The interests of the public, or of the juror, will be materially injured by the juror's attendance;

(C) The juror is physically unable to serve;

(D) The juror's spouse, or a near relative of the juror or the juror's spouse, has recently died or is dangerously ill;

(E) The juror had been called as a juror for trial in a court of record in the county within the same jury year.

When a person liable to serve is excused, in a case specified in this section, or when a person notified to attend a term as a juror is entitled to

and claims an exemption, the juror can be excused only by the judge presiding or a representative of the judge. Such an excuse shall not extend beyond that term. Every approved excuse shall be recorded and filed with the jury commission.

§ 2923.02 Attempt.

(A) No person, purposely or knowlingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this seciton.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented the commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to com-

mit aggravated murder or murder is a felony of the first degree. An attempt to commit an aggravated felony of the first or second degree is an aggravated felony of the next lesser aggravated degree than the aggravated felony attempted. An attempt to commit an aggravated felony of the third degree is a felony of the fourth degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeaner of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An

attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

§ 2907.02 Rape.

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this seciton purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b)

of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

§ 2313.12 Exemptions of jurors; proof of exemption; certificate of exemption; record. (GC § 11419-14)

The exemptions of jurors shall be such as are prescribed by sections 2313.01 to 2313.46, inclusive, of the Revised Code, and the general statutes of the state. The commissioners of jurors alone shall decide upon their qualifications and exemptions up until the time of notice for service, except as otherwise expressly provided in such sections; but the court may review and decide upon their qualificaitons and exemptions upon a written application and satisfactory legal proof at any time after they are notified and attend. The commissioners, upon request, shall issue to a person entitled to an exemption a certificate of that fact, which shall exempt the person to whom it is granted from jury duty during the time specified therein. Said commissioners shall keep a record of all proceedings before them or in their office, and of all persons exempted and the time and reasons for such exemptions.

§ 2313.17 Excuse presented in open court. (GC § 11419-19)

A person who has been notified to attend as juror and who makes application to be excused as provided by section 2313.16 of the Revised Code, on the ground that he is not qualified, or is exempt, shall present his excuse in open court to the judge. If such person cannot personally attend, he shall send his excuse by a person capable of making the necessary proof in relation to his claim to be excused. A note of the excuse and of the reason therefor shall be made and attested by the court, and shall be transmitted to the commissioners of jurors by the clerk of the court of common pleas, as part of the return made, as prescribed in sections 2313.01 to 2313.46, inclusive of the Revised Code.

§ 2911.12 Burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.

(B) Whoever violates this section is guilty of burglary, an aggravated felony of the second degree.

[§ 2947.05.1] § 2947.051 [Victim impact statement to be considered in imposing sentence.]

(A) In all criminal cases in which a person is convicted of, pleads guilty to and the plea is accepted to, or pleads no contest to and is found guilty of a felony, the court shall, prior to sentencing the offender, order the preparation of a victim impact statement by the department of probation of the county in which the victim of the offense resides, by the court's own regular probation officer, or by a victim assistance program that is operated by the state, any county or municipal corporation, or any other governmental entity if the offender caused, attempted to cause, threatened to cause, or created the risk of physical harm to the victim of the offense. The court shall, in accordance with sections 2929.12 and 2929.14 of the Revised Code, consider the victim impact statement in determining the sentence to be imposed upon the offender.

(B) Each victim impact statement shall identify the victim of the offense, itemize any economic loss

suffered by the victim as a result of the offense, identify any physical injury suffered by the victim as a result of the offense and the seriousness and permanence of the injury, identify any change in the victim's personal welfare or familial relationships as a result of the offense and any psychological impact experienced by the victim or the victim's family as a result of the offense, and contain any other information related to the impact of the offense upon the victim that the court requires.

(C) A victim impact statement shall be kept confidential and is not a public record as defined in section 149.43 of the Revised Code. However, the court may furnish copies of the statement to both the defendant or his counsel and the prosecuting attorney. Any copies of the victim impact statement that are made available to the defendant or his counsel or to the prosecuting attorney shall be returned by the person to whom they were made available to the court immediately following the imposition of sentence upon the defendant.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: December 19, 1990

State of Ohio,
Appellee,

v.

Ray Patton,
Appellant

Case No. 90-1797

E N T R Y

Upon consideration of the motion for leave to appeal from the Court of Appeals for Lucas County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40,00, paid by Lucas, Prendergast, Albright, Gibson & Newman.

(Court of Appeals No. L89041)

/s/

THOMAS J. MOYER
Chief Justice

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appendix was mailed to Dean P. Mandross, Prosecutor's Office, Common Pleas Court of Lucas county, Ohio, Courthouse, Toledo, Ohio 43624 this 27 day of February, 1992.

John C. Rust
Counsel for Petitioner